No. 6542

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH BROWN, RUDOLPH BOUTHELLIER, and FRANK BOUTHELLIER,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief of Appellee

Upon Appeal from the United States District Court for the District of Oregon

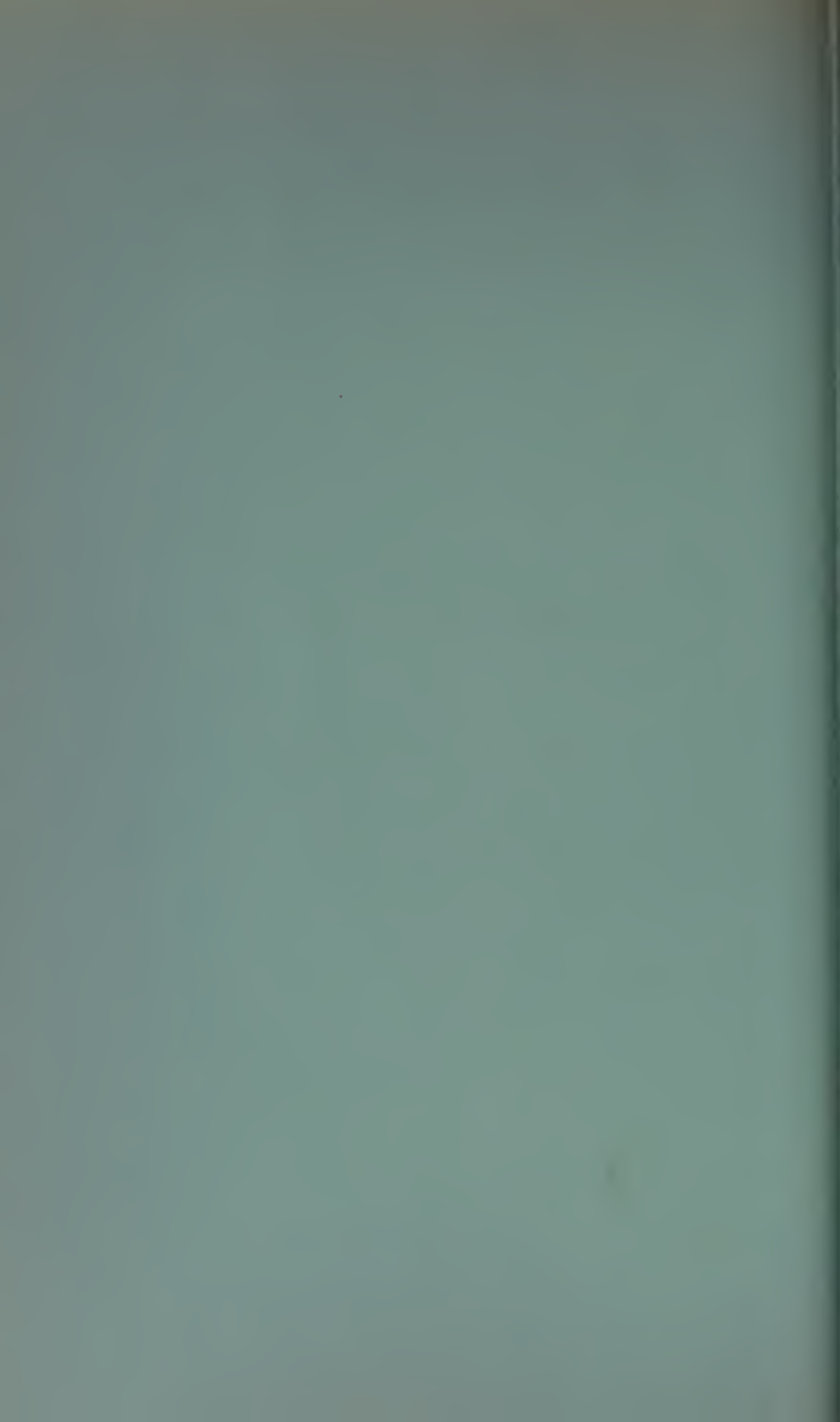
Names and Addresses of Attorneys of Record:

GEORGE NEUNER, United States Attorney,
CHAS. W. ERSKINE,
Assistant United States Attorney,
Federal Bldg., Portland, Ore.
Attorneys for Appellee.

BARNETT H. GOLDSTEIN,
Portland, Oregon
Attorney for Appellants.

Filed
SEP 1 1 1931

The Adam Printing Co., Portland, Ore. 40—9-3-31



No. 6542

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH BROWN, RUDOLPH BOUTHELLIER, and FRANK BOUTHELLIER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

Upon Appeal from the United States District Court for the District of Oregon

Names and Addresses of Attorneys of Record:

GEORGE NEUNER, United States Attorney,

CHAS. W. ERSKINE,
Assistant United States Attorney,
Federal Bldg., Portland, Ore.
Attorneys for Appellee.

BARNETT H. GOLDSTEIN,
Portland, Oregon
Attorney for Appellants.

INDEX

Page

Argument 12

Points and Authorities.. 7

Statement of the Case.. 5

Table of Authorities Cited:

Allen vs. United States, 4 F. (2d) 688..........8-13-35

Anstess vs. United States, 22 F. (2d) 594.... 9-24

Bailey vs. United States (C. C. A.) 5 F. (2d) 437 27

Baker vs. United States, 21 F. (2d) 905......

Bannon vs. United States, 156 U. S. 468 8-35

Blassis vs. United States, 3 F. (2d) 905........ 10

Brown vs. Elliott, 225 U. S. 392, 32 S. Ct. 812, 56 L. Ed. 1136.................................... 14

Chapman et al. vs. United States, 10 F. (2d) 124 10-27

Cheatham vs. State of Texas, 48 F. (2d) 749 11-33

Daily vs. United States, 5 Fed. (2d) 437...... 10

Davidson vs. United States (C. C. A.) 274 F. 285 35

Dowling vs. United States, 49 F. (2d) 1014.. 11-32

Dean vs. United States, No. 6350 (Unreported)..27

Etheridge vs. United States, (C. C. A.) 186 Fed. 434 33

Evans vs. United States, 133 U. S. 589.......... 8

Foster vs. United States, 11 F. (2d) 100...... 27

Frowerk vs. United States, 249 U. S. 204.... 8-13

Hyde and Schneider vs. United States, 225 U. S. 347, 364; 32 S. Ct. 793, 801, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.............. 15

Kettenbach, et al, vs. United States, 202 Fed. 376 9-17

Krause vs. United States, 147 Fed. 442........ 9-18

Logan vs. United States, 144 U. S. 263......10-29-32

INDEX

Page

Morris vs. United States, 7 F. (2d) 789 14

Otner vs. United States (C. C. A.) 13 Fed. (2d) 11 33

Rand vs. United States, 22 F. (2d) 502 14-25

Reger vs. United States, 46 F. (2d) 38 11-29

Remus vs. United States (CCA.) 291 F. 501 35

Schaefer vs. United States, 251 U. S. 466, 469, 40 Sup. Ct. 259, 64 L. Ed. 360 18

Southern Pacific Co. vs. Raugh, 49 Fed. 696 9-18

Stilson vs. United States, 250 U. S. 583, 585, 596, 40 Sup. Ct. 28 L. Ed. 1154 18

Stroud vs. United States, 251 U. S. 15 9-18

Thomas vs. United States, 156 Fed. 897 8-34

Tingley vs. United States, 34 F. (2d) 1 11-34

Todd vs. United States, 48 F. (2d) 11-33

United States vs. Jones, 69 Fed. 973 27

United States vs. Olmstead, 5 F. (2d) 712; 19 F. (2d) 842 7

United States vs. Kissel, 218 U. S. 601 7-12

United States vs. Cassidy, 67 Fed. 698 8

United States vs. Austin Bagley, etc., 24 F. (2d) 527 8-14

United States vs. Eisenminger, 16 F. (2d) 816 8

United States vs. Hall, 44 Fed. 883 8

U. S. C. A., Title 28, Sec. 424 8-16

U. S. C. A., Title 18, Sec. 557 10-27

Vlassis vs. United States, 3 F. (2d) 905 29

Young vs. United States, 24 F. (2d) 640 10-26

Wilkes et al. vs. United States, 291 Fed. 988 8-17

Windsor vs. United States (CCA.) 286 F. 51 35

STATEMENT OF THE CASE

The indictment charges the three appellants, with thirty-three other defendants and divers and other persons to the Grand Jurors unknown, in Count One thereof, with a conspiracy, that is to say that these appellants, with others

> "On or about the 12th day of October, 1927, the real and exact date which is to these Grand Jurors unknown, and continuously and at all times thereafter up to and including on or about the 15th day of September, 1930, did wilfully, unlawfully, feloniously and knowingly conspire * * * to * * * violate the * 'Volstead Act' in that they would in the counties of Multnomah, Clackamas, Polk, Marion, Linn, Yamhill, Washington, Columbia, Clatsop and Tillamook, and divers other counties to the Grand Jurors unknown, in the State and District of Oregon and within the jurisdiction of this Court, and in the Counties of King, Mason and Yakima, in the State of Washington, wilfully, knowingly and unlawfully manufacture, sell, barter, transport, possess, deal in, deliver and furnish intoxicating liquor, to-wit: etc."

There were fourteen overt acts alleged, covering a period of time from the 26th day of July, 1929, to and including the 20th day of July, 1930.

The indictment also included seventeen counts of substantive offenses against various defendants, including two of the appellants, to-wit: Rudolph Bouthellier and Frank Bouthellier, covering the same period of time as covered by the overt acts alleged to have taken place in furtherance of the conspiracy.

The appellant, Joseph Brown, was found guilty on Count One of the Indictment; the appellant, Rudolph Bouthellier, was found guilty on Count One of the Indictment and on Count Three thereof; the appellant, Frank Bouthellier, was found guilty on Count Three of the Indictment.

The appellant, Frank Bouthellier, is the same person as "Francis Bouthellier" referred to in the testimony and a brother of the appellant, Rudolph Bouthellier, who is also referred to in the testimony as "Rudy Bouthellier".

There was no demurrer to the indictment, nor a motion to quash the same, nor a request for a severance by the appellants, nor was there a timely motion to require the appellee to elect as to the counts in the indictment prior to the trial thereof.

The appellants severally moved for a directed verdict as to Count One of the Indictment and to the Counts in which they were named on the ground

> "That the evidence was insufficient to submit to the jury, upon the specific charges there-

> in contained, and for the reasons advanced during the course of the trial,"

which motions respectively made by the appellants were severally denied.

Neither of the appellants took the stand, nor offered any evidence, but throughout the trial interposed the objection that the evidence tended to establish

> "At least five separate and distinct conspiracies * * * the evidence is totally at variance with the testimony as adduced and charged in the indictment."

There are fifty-three Assignments of Error alleged by the appellants, but only a few are mentioned in appellants' brief. We will, therefore, attempt to meet such assignments as are treated in the brief and those which we think are worthy of consideration by this Court.

POINTS AND AUTHORITIES

I.

The indictment charges a continuous conspiracy, which has been defined as a crime, **not renewable by other acts, constituting several offenses.**

United States vs. Olmstead, 5 F. (2d) 712; 19 F. (2d) 842.

United States vs. Kissel, 218 U. S. 601.

(a) Any party coming into a conspiracy at any stage of the proceedings, with knowledge thereof, is regarded as **a party to all the acts done by any of the other parties, then or afterwards, in furtherance of the common design.**

United States vs. Cassidy, 67 Fed. 698.

Thomas vs. United States, 156 Fed. 897.

Allen vs. United States, 4 F. (2d) 688.

(b) The act of one conspirator in furtherance of a common design is the act of all.

Bannon vs. United States, 156 U. S. 468.

Evans vs. United States, 133 U. S. 589.

(c) The indictment charges a conspiracy and it has been held not to be duplicitous or objectionable, **even if different crimes are charged as the object of the conspiracy.**

United States vs. Austin Bagley, etc., 24 F. (2d) 527.

Frowerk vs. United States, 249 U. S. 204.

United States vs. Eisenminger, 16 F. (2d) 816.

II.

In all cases where there are several defendants, or several plaintiffs, the parties on each side shall be **deemed a single party, for the purpose of exercising all challenges.**

Title 28, Section 424 U. S. C. A.

United States vs. Hall, 44 Fed. 883.

Kettenbach et al. vs. United States, 202 Fed. 376.

Wilkes et al. vs. United States, 291 Fed. 988.

(a) There is nothing in the record to show **that any juror who sat upon the trial was in fact biased** and the mere request for additional peremptory challenges **is not sufficient assignment of error.**

Stroud vs. United States, 251 U. S. 15.

Southern Pacific Co. vs. Raugh, 49 Fed. 696.

Krause vs. United States, 147 Fed. 442.

III.

The indictment charged a conspiracy to unlawfully **transport, sell and manufacture intoxicating liquor.** The evidence is conclusive that Brown sold the liquor to Bouthellier **for the purpose of delivery and distribution, and the re-sale by the latter, which the former well knew, of itself supports the conviction on Count One of the Indictment.**

Anstess vs. United States, 22 F. (2d) 594.

Rand vs. United States, 22 F. (2d) 502.

(a) A person selling liquor with knowledge that **the purchaser intends to transport it to another place** or deliver it to another person, **furnishes the means of committing the crime and shows a conscious participation in the unlawful scheme and makes him a party to it.**

Anstess vs. United States, supra.

IV.

The **buyer and seller** of **articles and materials** designed for the **unlawful manufacture of intoxicating liquor with knowledge thereof, consciously participates in the unlawful enterprise for he thereby aids and abets in the commission of the crime.**

Young vs. United Sates, 24 F (2d) 640.

V.

Conspiracy to commit several offenses may be charged in the same count of an indictment and where the **evidence fails to connect some of the defendants charged with substantive offenses, there is no misjoinder of such offenses.**

Title 18, U. S. C. A. Section 557.

Chapman et al. vs. United States, 10 F (2d) 124.

Daily vs. United States, 5 Fed. (2d) 437.

VI.

Where the defendants go to trial without objections to the indictment or to consolidation of the offenses, or **make a request for severance of the charges or a motion to compel the appellant to elect before trial, it is not open to them to make the objection for the first time after verdict.**

Blassis vs. United States, 3 F (2d) 905.

Logan vs. United States, 144 U. S. 263.

Kettenbach vs. United States, 202 Fed. 377.

VII.

Appellants can not gamble on an acquittal at a trial and then object to a misjoinder after conviction. It was their duty to move to quash or require the appellee to elect before trial.

Dowling vs. United States, 49 F. (2d) 1014.

Todd vs. United States, 48 F. (2d) 530.

VIII.

This Court must consider the instructions refused, and the charge as given, not in the abstract **but as applied to the facts in the case.**

Todd vs. United States, 48 F. (2d) 530.

Cheatham vs. State of Texas, 48 F. (2d) 749.

IX.

Accomplices' testimony need not be corroborated to warrant a conviction in the federal court.

Reger vs. United States, 46 F. (2d) 38.

(a) The trial court followed **the uniform rule which obtains, in charging the jury to carefully scrutinize the testimony of accomplices before crediting it, which is sufficent.**

Tingley vs. United States, 34 F. (2d) 1.

X.

The substantial rights of the appellants were not affected by any ruling of the Court, and it has been held that on review of a joint conviction of any defendant for conspiracy, admission of evidence ob-

jected to by but one defendant, who did not prosecute writ of error, is not reviewable.

Allen vs. United States, supra.

ARGUMENT

It is not necessary to cite many authorities to this Court as to what shall constitute a continuous conspiracy. A casual perusal of the indictment will show that the language employed meets all of the requirements of statutory pleading and follows the rule laid down by Judge Neterer in United States vs. Olmstead, 5 F. (2d) 714, wherein he gives us the following definition:

> "Conspiracy is defined as a continuous crime, not renewable by other acts constituting several offenses."

The learned Judge cites United States vs. Kissel, 218 U. S. 608, wherein Mr. Justice Holmes of the United States Supreme Court says:

> "A conspiracy is constituted by agreement, it is true, **but it is the result of the agreement,** rather than the agreement itself, just as a partnership, **although constituted by a contract,** is not the contract **but is a result of it.** The contract is instantaneous, the partnership has one and the same partnership for years. A conspiracy is a partnership in criminal purposes. **That as such it may have continuation in time is**

> **shown by the rule that an overt act of one partner may be the act of all, without any new agreement specifically directed to that act."**

In the instant case it was strenuously urged as in the case of Allen vs. United States, 4th F. (2d) 692, that the evidence showed various conspiracies, but, said the Court:

> "It was frequently and plausibly argued in the various briefs that at most, **the evidence showed various conspiracies, which terminated before several of the defendants appeared upon the scene. But one may join a conspiracy after it has been formed and if he participates knowingly, he becomes a party thereto just as though he conceived the plot.** One actor may drop out of the scene altogether and another take his place without the conspiracy terminating."

The indictment in the Olmstead case, supra, was approved by this Court in the case of Olmstead vs. United States, 19 F (2d) 842.

It was also said in Frohwerk vs. United States, 249 U. S. 210, by Justice Holmes speaking for the court:

> **"The conspiracy is the crime, and that is one, however diverse its objects."**

Without unduly burdening this Court with au-

thorities upon the subject we quote, however, District Judge Adler of New York, in the case of United States vs. Austin-Bagley etc., 24 F. (2d) 528, which we believe is helpful and a persuasive statement of the law, as interpreted by the Court of last resort:

> "The indictment charges a continuous conspiracy over a period of two years, involving a number of persons in a number of different places. **The defendants' objection is that the indictment charges several different conspiracies at several different places.** The case of Brown v. Elliott, 225 U. S. 392, 32 S. Ct. 812, 56 L. Ed. 1136, is authority for the proposition that, **'when the plot contemplates bringing to pass a continuing result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one'."**

Appellants no doubt labor under the erroneous assumption that inasmuch as the overt acts charged in the indictment name different places and different dates, that this constitutes separate conspiracies, but not only the above quotation sets that contention at rest, but this identical question was before the Court in Morris vs. United States, 7 F. (2d) 789,

where Circuit Judge Kenyon of the Eighth Circuit makes the following observation:

> "The mere fact that the defendants might have conspired in a number of places does not defeat prosecution in one of the places within the jurisdiction of the District Court. If so, multiplicity of places of conspiring would result in immunity from prosecution. The Supreme Court said in Hyde and Schneider v. United States, 225 U. S. 347, 363, 364, 32 S. Ct. 793, 801 (56 L. Ed. 1114, Ann. Cas. 1914A, 614): 'We see no reason why a constructive presence should not be assigned to conspirators as well as to other criminals; and we certainly cannot assent to the proposition that it is not competent for Congress to define what shall constitute the offense of conspiracy or when it shall be considered complete and do with it as with other crimes which are commenced in one place and continued in another'."

The above was affirmed by the Supreme Court in 270 U. S. 640.

II.

The second Assignment of Error which Appellants stress is that each was denied the statutory number of peremptory challenges of jurors by the Court. There is nothing in the record to in the least

indicate that any juror who sat in judgment was biased, or in any way disqualified. The record does not show that the defendants would have used additional peremptory challenges, if permitted to do so by the Court, nor does the record disclose that any additional juror was challenged and the challenge denied by the Court. We contend that it is necessary for each appellant to point out wherein the Court erred and he was denied a fair and impartial trial, and that fact brought clearly before the Court by the necessity for additional challenges, which were overruled, or by some evidence tending to show that the Court abused its discretion. Under Section 424 U. S. C. A., Title 28, we observe the following statutory provision:

> "and in all cases where there are several defendants or several plaintiffs, **the parties on each side shall be deemed a single party for the purposes of all challenges under this section."**

This section has been construed and held applicable to cases similar to the one under consideration in United States vs. Hall, et al, 44 Fed. 883. The Court construed the law and held in substance, that where there are several defendants they shall be deemed a single party for the purposes of all challenges. and

> **"Under this section, the Court must accept**

> **the imperative and paramount authority of the national legislature as controlling this question."**

In Kettenbach et al. vs. United States, 202 Fed. 377, which is an opinion by the late Circuit Judge Gilbert of this Court, this identical matter was again before the Court and disposed of as follows:

> "Where indictments against two defendants for violating the National Bank Act were consolidated on their application, the consolidated indictments **become in legal effect separate counts of a single indictment,** and the defendants were, therefore, only **entitled to ten peremptory challenges as in the case of a trial under a single indictment."**

In Wilkes vs. United States, 291 Fed. 991, Circuit Judge Knappen of the Sixth Circuit commented on a similar situation and disposed of it in the following terms:

> "Section 287 of the Judicial Code (Comp. St. 1264) provides that on the trial of any noncapital felony, the defendant 'shall be entitled to ten * * * peremptory challenges * * * and in all cases where there **are several defendants or several plaintiffs,** the **parties on each side shall be deemed a single party for the purposes of all challenges under this section.'** The several defendants were represented by different counsel.

Complaint is made that the court refused to apportion the challenges between the defendants. In this there was no error. Stilson v. United States, 250 U. S. 583, 585, 596, 40 Sup Ct. 28, 63 L. Ed. 1154; Schaefer v. United States, 251 U. S. 466, 469, 40 Sup. Ct. 259, 64 L. Ed. 360."

In the latter case the request undoubtedly was similar to the case at bar, wherein the Court was directed not only to allow additional challenges but to apportion them, which the Court refused to do, and by its act abused no discretion, merely complied with the law.

The record, however, does not show sufficient cause for the Assignment of Error upon this question. The Courts have pointed out what is necessary for the record to show before it constitutes error on the part of the Court. The following cases support our views upon that subject:

Stroud vs. United States, 251 U. S. 15.
Southern Pacific Co. vs. Raugh, 49 Fed. 696.
Krause vs. United States, 147 Fed. 442.

III.

The indictment, Count One, charged a general conspiracy to

"unlawfully manufacture, sell, barter, transport, possess, deal in, deliver and furnish intoxicating liquor, etc."

The Court committed no error in its refusal to direct a verdict of acquittal as contended for by the appellants.

Appellants have ingeniously endeavored to carve out of the general scheme a number of independent and separate conspiracies, set forth on pages 22 to 27 inclusive, of their Brief, but only a casual perusal of the testimony in the case will show the fallacy of their position. We ask the indulgence of the Court to set forth a summary of the testimony, as given by some of the witnesses for the appellee:

JOHN GILLILAND, a defendant, testified for the Government in substance as follows:

That he met Rudolph Bouthellier in the spring and Frank Bouthellier in the summer of 1929; that he bought whiskey from Frank Bouthellier about August 1, 1929, for which he paid him $7.00 a gallon; that thereafter he met the defendant, Frank Hodgson, in Frank Bouthellier's room in the Belmont Hotel, Portland, and a week later at the same place he again met Frank Bouthellier who was then buying his whiskey from Joe Brown. That about two weeks later he saw Frank Hodgson at the same place, at which time Joe Brown and Frank Bouthellier were present; that he was then working for Frank Bouthellier delivering whiskey from plants located in garages, to which he was directed by

Frank Bouthellier, who was then selling and dealing in whiskey in lots of nothing under a gallon, nor over 50 gallons. (Tr. 89.)

That about the first day of December, 1929, Frank Hodgson hired Gilliland to run a still at $10.00 a day and if he got knocked over that he would be taken care of and paid $5.00 a day while he was in jail. He was advised that if he got knocked over, to notify defendants Frank Hodgson or Walter Tooze; that he first went to work for Frank Hodgson at the Baker Ranch near Stayton, Oregon; **(See Overt Act 2)**; that he went to the Baker Ranch with Frank Hodgson in a Kenworthy Truck which was loaded with five tons of sugar; when he got there he met defendant, Emmons Jelkin, and several of the other defendants; that he started to haul whiskey from the Baker Ranch still; that he hauled the whiskey in a Chrysler Coupe under the direction of Frank Hodgson; that he hauled this whiskey in 50 gallon lots to Frank Bouthellier, and Frank Bouthellier transferred it to his own Chrysler Coupe; that finally the ager blew up and he came back to Portland; later the still burned down and he went to Seattle, before going he saw Rudolph Bouthellier, Frank Hodgson and others in an apartment house at 28th Street in Portland; that he went to Seattle the last part of December, 1929, with Rudolph Bouthellier.

That while in Seattle, Gilliland, with the defend-

ant, Rudolph Bouthellier, delivered whiskey for the defendant, T. P. Hodgson; that he saw the defendant, Joe Brown, on numerous occasions prior to going to and at Seattle in the fall of 1929; that he overheard a conversation in Seattle between Joe Brown and Frank Hodgson, that Hodgson needed money and he asked Brown for it and Joe Brown gave him $300, the money was to help build a still.

That while he was in Seattle he saw the defendants, Joe Brown and Walter Tooze, in Gertrude Hodgson's apartments and that at that time they were discussing protection from the officers, and by that he meant "paying the cops off"; that he was introduced to the defendant, Tooze and Tooze inquired of defendant Hodgson if he, the witness, was one of Frank Hodgson's men; that the witness did not remember the rest of the conversation which took place in the room; that there were present Emmons Jelkin, Frank Hodgson, Walter Tooze, Joe Brown and Gertrude Hodgson. That he hauled whiskey from Seattle to Portland, was paid by the Hodgsons at the rate of $10.00 per day, and worked for about six months. (Tr. 90 to 95.)

Emmons Jelkin, another co-conspirator and defendant, called by the Government, testified that he knew a number of the defendants including the three appellants; that he went to work for the defendant, Frank Hodgson, in November, 1929, at $10.00 per

day and expenses, to haul whiskey from Portland to Seattle; that the first work he did for him was setting up the still on the Baker Ranch **(Overt Act 2)**; that he worked for him until about July, 1930; that he received his instructions from Frank Hodgson; that he hauled whiskey to different places and different defendants, including the appellants herein; that in May, 1930, he was taken to the Zielinski Ranch **(Over Act 5)** where a still was in operation; that he was taken there by the appellant, Rudolph Bouthellier, in an Oldsmobile Coupe, which was the same car that he had hauled liquor in to the appellant, Joe Brown; that he also delivered liquor from the Zielinski Ranch to Joe Brown at Tillamook in June, 1930, on one trip 50 gallons, another trip 120 gallons and on another trip 50 gallons, pursuant to the instruction from Joe Brown where to deliver it that he got 32 sacks of sugar from the defendant, Mussorafite, also gallon jugs, 12 cartons at one time; that Mussorafite conducted a regular malt shop and that he delivered to Mussorafite whiskey from the Zielinski still. (Tr. 108 to 117.)

To this testimony, as well as the other testimony of the Government, the appellant, Joe Brown, moved continuously that it be stricken out and the jury instructed to disregard it, upon the same ground and for the same reasons as heretofore stated that it does not show a conspiracy and, therefore, is insuf-

ficient to support a verdict of conviction.

JACK GRANT, a witness on behalf of the Government, under employment by the Prohibition Department, whose testimony appears in Tr. 124 to 157, testified that while employed by the appellant, Joseph Brown, he made deliveries to various of the co-defendants; that he drove Joe Brown to Astoria, where he (Brown) was trying to make arrangements to haul liquor; that he delivered 15 gallons to Jack Kelly, another defendant; that on April 7th, with Prohibition Agent Moon, he saw Joe Brown and Jack Kelly at Jack Kelly's place; that Kelly told Brown that the liquor was pretty bad and to try and get it more uniform and a little better; that he paid Joe Brown $30.00 in cash and $30.00 by check in payment for some liquor (Tr. 127); that he saw Joe Brown, Vic Scholtz, and Prohibition Agent Moon on April 18, 1930, at 224 Grand Avenue, Portland; that he (Grant) and defendant, Art Hines, ran an old Chevrolet touring car into a garage and Joe Brown told Prohibition Agent Moon that he bought the car for Moon to haul liquor in (Tr. 134).

When analyzed, the evidence supports the conviction on Count One of the Indictment.

COUNT NO. 3

William Webb testified that his parents lived on the Zielinski Ranch, near Scio, Oregon; that he vis-

ited them in June, 1930; that he saw Rudy Bouthellier haul six loads from the still in operation there; that he went to work for Frank Hodgson, hauled whiskey with Rudy Bouthellier, saw several of the defendants where the still was in operation, including the appellant, Francis Bouthellier, on July 3d, 1930, who drove to the still in a Ford coach or sedan; that he saw Tooze, Elsie Hodgson, Frank Hodgson, Frank Cameron, and Paul Richardson, and others at the Morris Hotel, where he received money, and they talked about the still at the Zielinski Ranch (Tr. 223-226).

All of this corroborated the other witnesses, and sustains the conviction of the Bouthelliers on Count No. 3. The evidence was for the jury, and this Court will not retry a question of fact. It also sustains the conviction of appellants on Count One, and certainly no error was committed by the Court's refusal to direct a verdict of not guilty.

It was said in Anstess vs. United States, 22 F. (2d) 594, that

> "It is insisted that there is no evidence to support the verdict of guilty against plaintiff in error, and this is the only question presented. **It** is conceded that he is guilty of transporting liquor, **but it is contended that the evidence does not establish that he conspired with any other person to transport it.**

"To sustain the verdict, it is not necessary that the evidence show a conspiracy to both transport and sell. It is sufficient if it shows a conspiracy to either transport or sell. And, further, if the evidence warrants a finding that plaintiff in error conspired with a person not named as a defendant, it is sufficient."

We have more than the mere possession or delivery of intoxicating liquor in the instant case. We have a general confederation, agreement and plan to manufacture, barter, sell and deliver intoxicating liquor, the united participation and co-operation of the appellants herein from the early spring of 1929, until the latter part of July, 1930.

A person selling liquor with knowledge that the purchaser intends to re-sell or transport it to another person or place, certainly furnishes the means of committing the crime, which constitutes a conscious participation in the unlawful scheme and makes him a party thereto.

Rand vs. United States, 22 F. (2d) 504.

IV

But appellants insist that the mere buying and selling of articles or materials, even though designed for the unlawful manufacture of liquor, is not sufficient evidence to support a conviction of a conspiracy. While this argument has been set at rest

by previous discussion and authorities, yet this Court has held that the seller of articles and materials to one engaged in the unlawful manufacture of intoxicating liquor and who has knowledge thereof, consciously participates in the unlawful enterprise, for he thereby aids and abets in the commission of a crime.

Young vs. United States, 24 F. (2d) 640.

It is elementary that if a person, after the conspiracy is formed, with knowledge of its existence, joins therein and aids and assists in its execution, he thereby becomes a party thereto, as much as if he had been an original conspirator.

V

It is a settled rule of law that a conspiracy to commit several offenses may be charged in the same indictment and, as heretofore stated, if the evidence fails to connect some of the defendants, charged with the substantive offenses, that would not constitute a misjoinder of the offenses. The crimealleged in the indictment is one—that of a conspiracy. The crimes alleged in Count One and in the substantive offenses all are of the same class—all for the violation of the "Volstead Act."

It is true that not all of the defendants who were charged with conspiracy, in Count One of the indictment, were charged with substantive offenses. This,

however, does not change the general rule of pleadings and it has repeatedly been upheld by the Courts of the land, and only in a recent case of this Court—that of Charles J. Dean, Appellant, vs. United States, No. 6350, filed August 10, 1931, unreported. The opinion by Mr. Justice Sawtelle is very instructive upon this phase of the case and decisive of the question of misjoinder of offenses.

18 U. S. C. A., Sec. 557.

United States vs. Jones, 69 Fed. 973.

Foster vs. United States, 11 F. (2d) 100.

But let us see what has been held in other circuits involving the same question. In the Fifth Circuit, in the case of Chapman vs. United States, 10 F. (2d) 125, Circuit Judge Bryan comments upon this identical question as follows:

> "It is argued that the conspiracy count is bad, because it charges more than one criminal offense. It is permissible to charge a conspiracy to commit several offenses in the same count of an indictment. Bailey vs. United States, (C.C.A.) 5 F. (2d) 437. **It is also insisted that there was a misjoinder of offenses, in that the evidence failed to connect some of the defendants with the substantive offenses of transporting automobiles which they knew had been stolen.** It is not shown that injury resulted from this, but, on the contrary, it appears that the court care-

fully protected the rights of each defendant. **The substantive offenses related to the same automobiles described in the overt acts, but the evidence failed to show that all of the defendants were guilty of the substantive offenses. The crimes were all of the same class and were properly joined."**

We submit that the Court committed no error in denying the motion for a directed verdict. It is true that counsel for appellants cite many cases which they contend uphold their theory of this case, but those cases are not applicable to the facts in the case at bar. We have no argument with counsel but what that is the law when applied to the given state of facts in each case, but not in one single case cited do we find a state of facts analogous with those disclosed by the record in this case.

VI

No lawyer would contend that if the appellants in the instant case had been separately indicted, as contended for by them, but what, on application to the Court, their cases would have been consolidated for trial, but that is not the question presented here. The defendants were charged in one indictment with crimes of the same class, and where they go to trial without making a request for a severance of the charges, it is not open to them to make the objection for the first time after verdict. It is true

that they moved to strike the testimony, but that is not sufficient to raise the question properly. Vlassis vs. United States, 3 F. (2d) 905. Opinion by the late Judge Ross of this Court is instructive. We quote from page 906 of the opinion:

> "Regarding the contention that the indictments were improperly consolidated, it is sufficient to say that Congress has enacted that, **'when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together,** or for two or more acts or transactions **of the same class of crimes or offenses which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases the court may order them to be consolidated,'** and to point to the decision of the Supreme Court in the case of Logan vs. United States, 144 U. S. 263, 296, 297, 12 S. Ct. 617, 36 L. Ed. 429, where that court held that where defendants go to trial without objection on consolidated indictments, **it is not open to them to take the objection for the first time after verdict."**

Peruse the case of Reger vs. United States, 46 F. (2d) 39. Circuit Judge Cotteral disposes of a con-

tention very much like the case at bar. We quote him as follows:

"A main contention of the appellants is that insufficient evidence was adduced at the trial to establish the conspiracy, **and particularly it was not shown by violations of the Prohibition Act, nor by mere knowledge of and acquiescence in the operation of the still.**

"Concededly, **the unlawful agreement was essential to the guilt of appellants,** and more was **required than proof of the commission of a substantive offense against the act.** But the evidence in the record was ample to sustain the charge against the appellants.

"In the first place it was shown without dispute **that a large still was located and operated in a barn at the ranch. Some one or more parties must have been concerned in the enterprise. The issue before the jury was whether the appellants combined to engage in it.** There was testimony that Reger hired a woman as a cook at the ranch and paid her for her services, that she cooked meals for the employees thereon, that Reger took supplies to the ranch, that he assisted in installing the still and gave orders for running it, that both appellants employed a man for this purpose and accompanied him when he

hauled twelve cases of whiskey from the still to Denver, that Reger helped to operate the still and Cefalu to repair it, that Reger warned a party away from the barn on account of bad dogs, that Reger paid for hauling sugar, yeast, and kegs to the place, that Cefalu drank a good deal of whiskey there, that they were frequently at the still, and that they asked another party how long he thought they could run the still.

"**The appellants denied the conspiracy and the incriminating testimony, and sought to discredit the opposing witnesses.** They admitted that they visited the ranch and Cefalu that he drank whiskey there, but they sought to account for these visits as occurring while they were hunting in the locality.

"It cannot be doubted that the evidence in behalf of the government, **if credited, together with the inferences reasonably to be drawn from it, was sufficient to establish the conspiracy by the required measure of proof. To hold otherwise would be to clearly invade the province of the jury in passing upon the weight of the evidence.** The verdict concluded the issue."

VII

The appellants can not gamble on a chance of acquittal on a trial and then object to a misjoinder after conviction. The proper challenge would have

been a motion to quash or to require the Government to elect before trial.

It was said in Dowling vs. United States, 49 F. (2d) 1015, by the Circuit Court of the Fifth Circuit that:

> **"If the defendant is embarrassed by such a fault in the indictment against him, he should in advance of the trial, move to quash it or have a severance or to compel the prosecution to elect on which counts he shall be put to trial. He can not take a chance of acquittal on trial and object to the misjoinder only after conviction."** Logan vs. United States, 144 U. S. 263, 297, etc.

This matter was also clearly before the Court in Todd vs. United States, 48 F. (2d) 530, wherein the Court comments on a situation similar to the one at bar. We quote from page 532:

> "From the statement of the evidence above, it is clear that, though ordinarily it is not good practice to join in an indictment counts charging distinct offenses against separate defendants, U. S. vs. McConnell, (D. C.) 285 F. 164, the action of the court in this case cannot be assigned as prejudicial error, not only because a motion to quash is ordinarily addressed to the discretion of the court and is not the subject of review by an appellate court, Gay vs. U. S.,

(C. C. A.) 12 F. (2d) 433, and because, **if there was a misjoinder, the objection was not well taken by demurrer, but must be by motion to compel an election.** Optner vs. U. S., (C. C. A.) 13 F. (2d) 11; Etheredge vs. U. S., (C. C. A.) 186 F. 434, **but also because, though the indictment does contain separate counts as to separate defendants, the matters charged in reality constitute but one series of transactions, and the facts relied upon for the conviction of Chevis in the first,** and Todd in the second, count, are the same facts relied upon for the conviction in the third count of Todd and Day, Davis vs. U. S., (C. C. A.) 12 F. (2d) 253."

VIII

Appellants complain at the Court's refusal to give some 28 requested instructions on behalf of the appellant, Joe Brown, and note exceptions to various instructions given by the Court and in that connection we might say that this Court must consider instructions refused and those given, not in the abstract but as applied to the facts in the case.

Todd vs. United States, 48 F. (2d) 530.

Cheatham vs. State of Texas, 48 F. (2d) 749.

IX

Accomplices' testimony need not be corroborated to warrant conviction in the Federal Court.

In Reger vs. United States, supra, a request was denied, identical with the one herein, and the Court said:

> "One request which was refused was that the testimony of an accomplice must be corroborated before it is sufficient for conviction. **There were witnesses for the government of that class. By uniform rule, no such requirement obtains in the federal courts. And in this case, the trial court followed the precedent of cautioning the jury to carefully scrutinize the testimony before crediting it. This was certainly sufficient."**

Tingley vs. United States, 34 F. (2d) 1.

FINALLY

It was said in Baker vs. United States, 21 F. (2d) 905:

> "The rule of responsibility for the acts of **co-conspirators includes acts done before the defendant joined the conspiracy, as well as the acts subsequent to his participation.** 5 R. C. L. 1064, and cases there cited.

> "One joining a conspiracy after its formation, by contributing to its carrying out with knowledge thereof, would be liable. Rudner vs. United States, (C. C. A.) 281 F. 516; Thomas vs. United States, (C. C. A.) 156 F. 897, 17 L. R. A.

(N. S.) 720; Lincoln vs. Claflin, 7 Wall 132, 19 L. Ed. 106."

That case is also the authority for a rule of law which obtains and is applicable to the instant case. We again quote from page 905 as follows:

> "**An overt act need not be proved against all the members of a conspiracy.** Bannon vs. United States, 156 U. S. 464, 15 S. Ct. 467, 39 L. Ed. 494.
>
> "To sustain a charge of conspiracy, the government need not furnish direct proof of the unlawful plan or agreement, but such charge may be sustained by evidence showing a concert of action in the commission of an unlawful act, or by proof of other facts from which the natural inference arises that the unlawful overt act was in furtherance of a common design of the alleged conspirators. Windsor vs. United States, (C. C. A.) 286 F. 51; Davidson vs. United States, (C. C. A.) 274 F. 285; Remus vs. United States, (C. C. A.) 291 F. 501."

Let us again revert to the case of Allen vs. United States, supra, which is on all fours, we take it, with the case at bar, and we are very much impressed with the learned opinion therein and can best express the difficulties of the trial judge, where there are fourteen attorneys representing various defendants, and the summation therein, we think, is applic-

able herein. We quote from Pages 698 and 699, on petition for he-hearing:

> "While it might have been more satisfactory to both the trial court and to ourselves, had there been a smaller number of defendants indicted, we are not prepared to say that error was committed in proceeding to trial with 75 defendants. Neither the court nor the prosecuting attorney can fix or limit the number of persons who engage in a conspiracy to commit an offense against the United States. The action of the grand jury must be based upon the facts. A condition rather than a theory confronts it.
>
> "Whether all who are indicted should be tried at one time, or divided into groups, is a question that must address itself largely to the discretion of the trial judge. On the one side, there is the justifiable desire to avoid a repetition of trials, while, on the other hand, the number should not be so great as to necessarily confuse a jury, or make an intelligent or discriminating verdict impossible. The difficulty of the trial judge in attempting to make a classification of defendants, where many are on trial, is at once apparent. Likewise the unwillingness of certain defendants to be classified in one group or another must be considered.

"**In the present case it seems to us to have been a matter that added to the burdens and responsibilities of the trial judge rather than one of which any plaintiff in error can complain. In other words, had there been fewer defendants,** it is not at all unlikely that the government would have concentrated its efforts more directly and effectively upon each one of the accused. Plaintiffs in error, on the other hand, had many lawyers, **who devoted their energies and directed their attention to individual rather than to all defendants.** There is at least some support for the conclusion that the defendants were benefited rather than handicapped by being tried together.

"Were we otherwise in doubt respecting the rulings of the court on the admission of evidence and the exceptions taken thereto, illustrated by the testimony of Harold Cross, we would be consrained to hold, under Section 269 of the Judicial Code (Comp. St. 1246), that **'the substantial rights of the parties' were not affected by such rulings, and the judgment should be affirmed."**

It was held in the latter case that:

"On review of joint conviction of any defendant for conspiracy, admission of evidence objected to by but one defendant, who did not prosecute writ of error, held not reviewable."

We submit that in the instant case the testimony overwhelmingly supports the verdict of the jury and sustains the conviction of the appellants, Joe Brown and Rudolph Bouthellier, on Count One of the Indictment and the appellants, Rudolph Bouthellier and Frank Bouthellier, on Count Three of the Indictment. The fact that the conspirators, Frank Hodgson and T. P. Hodgson, were fugitives from justice and not on trial, would not make the overt acts charged against them prejudicial to the appellants herein. The question is whether or not there was a conspiracy between the appellants, or between the appellants and other defendants, or other persons to the Grand Jurors unknown, and whether or not, in furtherance of the conspiracy there was consummated one or more overt acts to effectuate the objects thereof.

Respectfully submitted,

GEORGE NEUNER,

United States Attorney

for the District of Oregon.